

Respondent contends the Administrative Law Judge should have calculated the average weekly wage on the basis of amount paid rather than a forty hour week times the hourly rate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board finds for purposes of preliminary order that the claimant was an employee of respondent at the time of his accident and injury. Kansas appellate courts have listed several factors to be considered in distinguishing between independent contractors and employees for purposes of the Workers Compensation Act. The right to control the manner or method of performing the work is generally considered the most important factor. See, Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Other important factors include the right to discharge the worker, payment by time rather than the completed project, and the furnishing of tools or equipment. See, McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965).

Application of the relevant criteria to the facts of this case support the Administrative Law Judge's finding that claimant was an employee. Claimant was hired as a brick layer. Although there was evidence that respondent may have intended to pay by the piece, the respondent did in fact pay by the hour and an hourly rate was intended as the minimum pay. Respondent set the hours. Claimant provided his own trowel and level. Respondent, on the other hand, provided the mixer, scaffolding, and wheel barrow. Evidence indicates respondent told claimant when and where he was to lay the brick. It appears respondent felt he did have the authority to terminate the relationship at any time. As indicated in Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965), the right to terminate the relationship at any time is incompatible with the full control which is usually enjoyed by an independent contractor.

The Workers Compensation Act is to be liberally construed for the purpose of bringing employers and employees within the provisions of the Act. See, K.S.A. 44-501. The Appeals Board believes that the record in this case establishes the respondent had right to control and shows other indicia of employment relationship. The Appeals Board, therefore, does affirm the decision of the Administrative Law Judge finding that the claimant was an employee and that the accident, therefore, arose out of and in the course of his employment as that language is used in the Kansas Workers Compensation Act.

(2) The Appeals Board affirms the decision of the Administrative Law Judge finding that claimant's average weekly wage was to be based upon \$8.00 per hour, 40 hours per week, resulting in a temporary total disability weekly rate of \$213.34.

A finding as to the amount of the average weekly wage is not a jurisdictional finding under the provisions of Section 49, Chapter 286, of the 1993 Session Laws of Kansas. Accordingly, at least where there is some competent evidence to support the decision of the Administrative Law Judge that decision will not be disturbed on appeal. In this case the evidence clearly establishes that although the claimant did not, for various reasons, work a full 40 hour week, he was expected to do so. Respondent's witness testified that claimant was to be payed on a piece work basis. Claimant testified he was to be paid \$8.00 per hour. Under the circumstances the decision of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, the Appeals Board finds that the decision of the Administrative Law Judge's Order of November 4, 1993, awarding medical care and temporary total disability benefits should be and same is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Jeffry L. Jack, P.O. Box 1034, Parsons, Kansas 67357
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Steven J. Howard, Administrative Law Judge
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